



**WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 17, 2003
10:45 a.m.**

01-3093-CR & 01-3094-CR State v. Victor Naydihor

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Kenosha County Circuit Court, Judge Bruce E. Schroeder presiding.

This case involves a man who was convicted of a crime, sentenced to prison, successfully argued to have that sentence vacated (cancelled), and then received a longer prison term when the sentence was redone. The Supreme Court will decide whether this was appropriate.

Here is the background: On Feb. 25, 2000, Victor Naydihor drove drunk and caused a crash that injured two people. He agreed to plead guilty to one charge of causing great bodily harm by the intoxicated use of a motor vehicle and, in return, the State agreed to dismiss the remaining charges. The State also agreed to recommend probation, but retained a free hand to recommend conditions of probation – such as jail time. Defendants may be given up to a year in the county jail as a condition of probation.

Naydihor pleaded guilty on April 7, 2000, and Judge Barbara A. Kluka ordered a pre-sentence investigation. These investigations are performed by the Department of Corrections and they provide the judge with information on the impact of the crime as well as information on the defendant, including criminal history, medical conditions, family background, and more. They also contain a sentencing recommendation.

At the sentencing hearing, the prosecutor told the judge that the State had offered the plea agreement to Naydihor without realizing the extent of his prior record. Indeed, the pre-sentence investigation recommended a harsher sentence. While the prosecutor argued for probation with jail time, as he had agreed to do, Kluka rejected this recommendation noting that the victim would be in a wheelchair for at least six months and that she would be unable to care for her blind spouse. Kluka sentenced Naydihor to a three-year term of initial confinement followed by five years of extended supervision (ES).

Naydihor filed a motion to vacate the sentence, arguing that the prosecutor had broken the plea agreement by mentioning Naydihor's past criminal record in court. Kluka granted Naydihor's motion and requested that the case be assigned to a different judge for resentencing.

Judge Bruce Schroeder presided in the resentencing and increased Naydihor's prison time by two years, giving Naydihor five years' initial confinement. Schroeder based his decision on testimony from the victim. She revealed that she might never walk again, was unable to work, and that her medical expenses of about \$70,000 had not been covered by her auto insurance.

Naydihor appealed, arguing that (1) the prosecutor had breached the plea agreement by mentioning his criminal past, and (2) the second judge did not have the authority to impose a harsher sentence. On the first issue, after noting that "while a

prosecutor need not enthusiastically recommend a plea agreement, he or she may not perform an ‘end run’ around a plea agreement by covertly conveying to the trial court that a more severe sentence is warranted than that recommended,” the Court of Appeals concluded that the prosecutor’s comments in this case were reasonable because he had maintained a free hand in the plea agreement to argue for conditions of probation.

On the second issue, the Court of Appeals concluded that case law¹ permits a judge, on resentencing, to consider any relevant information that has come to light following the original sentence.

In his appeal to the Supreme Court, Naydihor argues that federal case law² prohibits a court from increasing a sentence unless there is new, objective information concerning the defendant’s conduct between the original and new sentencing hearings. Nothing presented to the second judge about the victim’s medical or financial condition, Naydihor argues, was substantively different than what was before the first judge. Therefore, he reasons, the harsher sentence was not justified. The Supreme Court will clarify the circumstances under which a vacated sentence may be increased during resentencing.

¹ State v. Leonard, 39 Wis. 2d 461, 159 N.W.2d 577 (1968); State v. Carter, 208 Wis. 2d 142, 560 N.W.2d 256 (1997); State v. Church, 2002 WI App 212

² North Carolina v. Pearce, 395 U.S. 711 (1969)